SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652813/2012 **E** Hon. Andrea Masley Motion Seq. 020

INSURERS' REPLY MEMORANDUM SEEKING PARTIAL REVIEW AND MODIFICATION OF THE FEBRUARY 26, 2019 MEMORANDUM AND ORDER OF SPECIAL REFEREE MICHAEL DOLINGER REGARDING THE INSURERS' OMNIBUS MOTION TO COMPEL

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INTRODUCTION

The NFL Parties' opposition regarding search terms and indemnification agreements ("Opposition or "Opp.") [NYSCEF No. 526] is long on history and process but short on substance. As with their briefing before Special Referee Dolinger, the NFL Parties focus more on the discovery efforts they have made rather than on the relevance of the additional discovery they have failed to make. In any event, the NFL Parties do not deny that the [redacted] search terms at issue in the Insurers' Memorandum Seeking Partial Review and Modification [NYSCEF No. 505] ("Memorandum of Law") would lead to the production of responsive documents. *See* Opp. at 4-5. Nor do they adequately support their refusal to produce indemnity-related documents. *See id.* at 7-9. Rather, they again trot out arguments explicitly rejected by the Special Referee or otherwise proffer unavailing arguments that relevant documents need not be produced. This Court should reject their feckless arguments and order the discovery properly sought by the Insurers be produced.

First, the NFL Parties once again attempt to use the "undue burden" shield to protect themselves from any further discovery efforts. *See, e.g., id.* at 4. But the Special Referee recognized that any burden resulting from ordering the NFL Parties to conduct additional discovery is justified here given the "extraordinary financial stakes at issue in this case." *See* Referee's Memorandum and Order [NYSCEF No. 502] ("Order") at 49. *See also id.* (further noting that to the extent searching additional terms via computer overlaps with terms already utilized, "the byproduct of duplicated documents may be eliminated by a so-called de-dupe program."). And, as the Insurers reasoned in their briefing before the Special Referee, which he appeared to recognize, the fact that a party has produced documents already is not a basis to protect

it from having to produce more. *Compare* Memorandum of Law in Support of Insurers' Omnibus Motion to Compel [NYSCEF No. 499] ("Omnibus Opening") at 19-22 *with* Order at 46-50.

Second, one of the NFL Parties' primary arguments in opposing the Insurers' motion is that the Special Referee "carefully explained his decisions that most of the Insurers' search terms be used and that there was no litigable dispute regarding the indemnification agreements, articulating the factors upon which his decisions were based." Opp. at 3. Although the Insurers greatly appreciate the Special Referee's attention to this case, respectfully, it does not appear from his ruling what he considered when accepting some search terms but rejecting others, or that he considered all of the evidence the Insurers presented regarding indemnification. In fact, the Special Referee's ruling is silent on many of the issues raised herein.

Third, the NFL Parties broadly mischaracterize the Insurers' request for partial review and modification, which seeks to require the NFL Parties to produce relevant documents, as "nitpicking," "quibbling," or "meritless." *See* Opp. at 1-2, 4. Yet, when it comes to the substance of the specific discovery issues on which the Insurers seek the Court's review, the NFL Parties actually have very little to say. In this litigation, where the NFL Parties are seeking what has been estimated at over $1 ***billion*** in insurance coverage, the Insurers are entitled to make sure all pertinent issues are fully discovered. *See, e.g.*, *Kavanaugh v. Ogden Allied Maint. Corp.*, 92 N.Y.2d 952, 954 (1998) (noting New York favors "open and far-reaching pretrial discovery."); *Montalvo v. CVS Pharmacy, Inc.*, 81 A.D.3d 611, 612 (N.Y. App. Div. 2011) (courts are required to liberally construe CPLR 3101(a), which permits discovery of "all matter material and necessary in the prosecution or defense of an action," to include evidence required for trial preparation as well as matters that may lead to the disclosure of admissible proof); *see also Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every

available defense.") (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). Where, as here, the NFL Parties can articulate no logical reason why the pertinent discovery requests should not be granted, the Special Referee's ruling is not supported by the law, logic, or the evidence.[1]

The Insurers thus respectfully request that the Court order the NFL Parties to utilize the [redacted] narrow search terms discussed herein and produce all relevant indemnity agreements, regardless of whether the NFL Parties believe such agreements are applicable to the underlying claims.

ARGUMENT

A. The NFL Parties Should be Ordered to Utilize the Subject Search Terms

The NFL Parties assert that the Special Referee "carefully explained his decisions that most of the Insurers' search terms be used . . ., articulating the factors upon which his decisions were

[1] CPLR 3104(d) allows for review of an order made by a referee or special master. The Special Referee's decision will be upheld only if it is both supported by evidence in the record and a proper application of the law and discovery standards. *See Stark v. Reliance Nat'l Indem. Co.*, 273 A.D.2d 148, 148 (1st Dep't 2000). However, if the decision is contrary to the applicable law or standards, it must be vacated. *See Surgical Design Corp. v. Correa*, 21 A.D.3d 409, 411 (2d Dep't 2005) ("Since the Referee's order is not supported by the record, the Supreme Court should have granted plaintiff's motion pursuant to CPLR 3104 to vacate it."); *Those Certain Underwriters at Lloyd's, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843 (2008) (explaining that trial court had discretion to disaffirm the referee's findings of fact, although there was arguable support for those findings in the record).

based." Opp. at 3. However, with all due respect to the Special Referee's attention to this matter, and as the Insurers noted in their Memorandum of Law (at 4), the Special Referee did not specifically articulate why he chose to accept some search terms but reject others. And although the Insurers certainly appreciate the Special Referee's decision to accept [redacted] of their [redacted] proposed terms, their Memorandum of Law explained why the [redacted] terms at issue here are warranted, especially as it was not apparent from the Special Referee's Order that he evaluated the relevance – and indeed the potential significance – of these terms.

[redacted]: The Insurers reiterate that the dates [redacted] and [redacted] were released are entirely irrelevant, where so many of the issues in this insurance coverage litigation depend on the NFL Parties' historical knowledge of, and attitude toward, the risks of head trauma. [redacted] chronicle much of that key history. Nor is it a sufficient basis to reject these terms on the purely speculative ground that relevant communications could be captured by existing search terms – not every relevant document or communication mentioning [redacted] or [redacted] necessarily will contain existing search terms such as [redacted] Given that the Special Referee did not appear to specify any basis for his decision to exclude these terms, and because there is no readily apparent one, respectfully, his ruling was not supported by the record or a proper application of the law and applicable discovery standards.

[redacted] It is undeniable that [redacted] is an individual at the center of the historical (and ongoing) dialogue regarding the potential long-term risks of football-related head trauma, a fact the NFL Parties do not appear to dispute. The NFL Parties instead seem to reason that searching only [redacted] would guarantee the capture of all uses of [redacted].

True, there may be some "false positive" hits on the term [redacted] to the extent that there are documents involving [redacted], but it is also entirely conceivable that people would refer to [redacted]. Because the term is logical, relevant, and important, and the NFL Parties provide no logical reason to suggest otherwise, Special Referee Dolinger's decision to omit the term [redacted] is not supported by the record or a proper application of the law and applicable discovery standards.

[redacted]: The NFL Parties again do not deny the existence of documents in their possession referencing [redacted] As the Insurers noted in their Memorandum of Law (at 6-7), [redacted] The NFL Parties' assertion that this search might result in information that is "only tangential at best to the case" is 1) frankly an admission and 2) presupposes the alleged lack of importance of documents that they have steadfastly refused to produce, while plainly ignoring [redacted]. This further underscores the Insurers' need to explore this line of discovery.[2] Given

[2] Although the NFL Parties argue that the Insurers' request to use this term is a mere "fishing expedition," they provide no concrete reason why the term [redacted] is not relevant given its significance in the underlying action. The Insurers maintain that, given the allegations in the underlying lawsuits and in the media regarding [redacted], responsive documents should be produced now.

that the Special Referee did not appear to specify any basis for his decision to exclude this term, and because there is no readily apparent one, his ruling was not supported by the record or a proper application of the law and applicable discovery standards.

[redacted] The NFL Parties wrongly argue that, because the annotated list of search terms the Insurers submitted with their initial briefing before Special Referee Dolinger "did not explain how they were relevant to the case," the Insurers have waived the right to "belatedly explain how [redacted]r were relevant." Opp. at 6-7. This argument rings hollow in light of the fact the Insurers did in fact argue the [redacted] in their briefing before the Special Referee. *See* Reply in Support of Insurers' Omnibus Motion to Compel [NYSCEF No. 501] ("Omnibus Reply") at 10-12 (noting that, although the Insurers' document requests sought materials regarding the [redacted]). The NFL Parties provide no other reason why these terms are not relevant and would likely to lead to the production of responsive documents. Indeed, they cannot: [redacted] Because the Special Referee did not explain his basis for omitting these [redacted] terms, and the NFL Parties have not offered a valid basis for doing so, the Insurers respectfully submit the ruling is not supported by the record or a proper application of the law and applicable discovery standards, and that the NFL Parties should thus be required to utilize them as search terms.

[redacted]: As with [redacted] the NFL Parties do not dispute that there are potentially responsive documents in their possession. Rather, they focus on the potential "false positives" that may result from running the term [redacted]. But as a matter of logic, it is entirely conceivable that responsive documents reflect [redacted]

Because the terms above are plainly relevant to the Insurers' defenses, are logically and properly limited to some of the major issues in this case, and because there is no reason articulated in the Special Referee's Order to preclude these particular terms from being utilized, the Insurers respectfully request that this Court modify Special Referee Dolinger's Order to add the [redacted] search terms discussed above to the list of terms the NFL Parties are required to search.

B. <u>Team and Manufacturer Entity Indemnity Agreements and Communications Should Be Produced</u>

The Insurers seek two kinds of indemnity agreements: [redacted]

The NFL Parties ignore the Insurers' argument that the NFL Parties' [redacted], does not sufficiently satisfy the NFL Parties' discovery obligations. The Special Referee's ruling did <u>not</u> address this limitation on the NFL Parties' concession. *See* Order at 56. Further, the NFL Parties do not argue that [redacted].[3] Nor could they. It makes no sense that [redacted]

[3] Although the NFL Parties argue any type of indemnification agreements are not relevant to this coverage action in the first instance, *see* Opp. at note 4, the Insurers direct the Court to their

[redacted]. As such, the Insurers respectfully request that this Court order the NFL Parties to produce all documents and communications relating to [redacted]. The Special Referee's ruling does not address this issue, and is thus not supported by the record or a proper application of the law and applicable discovery standards. If the NFL Parties assert that [redacted], the Court should require them to affirm as much in writing.

Regarding indemnity agreements with the [redacted], the NFL Parties suggest that the "record easily supports" the conclusion that there is no litigable dispute about the adequacy of their production of indemnity agreements with [redacted]s because the Special Referee accepted the NFL Parties' self-serving statement that there was no such indemnification agreement "pertinent to the current case," as set forth in the NFL's constitution and by-laws. Opp. at 7-8. The NFL Parties once again ignore – and the Special Referee's ruling does not appear to address or even acknowledge – the numerous additional documents, including materials submitted to the Insurers when purchasing the policies and a publicly filed auditors' report, illustrating that there may be some additional indemnification obligations between the NFL and [redacted] beyond what the NFL Parties have suggested here. *See* Memorandum of Law at 9-11.

Omnibus Reply, at 22-24, discussing case law recognizing why such indemnification evidence is plainly relevant to insurance coverage cases.

The Insurers respectfully submit that the NFL Parties should be ordered to produce any and all responsive materials regarding potential indemnification as between the NFL Parties and [redacted].

CONCLUSION

This is a large case that spans decades and involves numerous issues. New York law favors broad discovery. Respectfully, the Insurers believe the Special Referee's decision is inconsistent in that it offers no basis to require the NFL Parties to search for only a subset of relevant material but not other documents of a similar nature (*e.g.*, [redacted]). In addition, the Insurers' requests are plainly relevant to issues that are at the core of this case and the underlying cases (*e.g.*, [redacted]), the Insurers respectfully request that the Court modify the Special Referee's ruling to order the NFL Parties to utlize the [redacted] additional search terms identified above and to search for and produce any and all [redacted]

Dated: April 4, 2019
New York, New York

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